United States District Court—Southern District of New York.

IN RE GARRET S. BELLIS AND JAMES MILLIGAN.

A witness who was a lawyer being under examination was questioned touching a certain conveyance made to him by the bankrupt and wife and a subsequent conveyance by him to the wife, and refused to testify thereon as matter within the privilege of confidential communications between attorney and client.

Held, on the facts stated the questions were proper and must be answered, and are not within such privilege.

ON April 8th 1868, James Milligan and wife executed a deed conveying certain property to ——— ———.

On April 10th 1868, the said ——— ——— conveyed the same property to Elizabeth R. Milligan, wife of said James Milligan.

——— ——— is an attorney; being called as a witness in the matter of Bellis and Milligan, bankrupts, he refused to testify concerning the said transfers on the ground that they were made in the course of his professional business, and are therefore within the privilege of confidential communications between him and his clients.

The following questions were asked, all of which the witness refused to answer:—

Q. 1. State whether James Milligan, one of the bankrupts, conveyed to you by deed, on or about the 8th day of April 1868, certain real estate situated in the city of Brooklyn.

Q. 2. State the consideration, if any, given by you to him therefor.

Q. 3. State whether you simultaneously, on or about the same date, by deed, conveyed to Elizabeth R. Milligan, wife of said James Milligan, the same premises so conveyed to you by James Milligan on or about the 8th day of April 1868.

Q. 4. State the consideration, if any, given to you by Elizabeth R. Milligan therefor.

Q. 5. State whether at that time any suit or action at law was pending in relation to the said real estate between the said James Milligan and wife and any person, in which you were attorney or counsel of Mr. and Mrs. Milligan, or whether there has, since the 8th day of April 1868, been such an action pending in relation to said real estate in which you were attorney or counsel.

JOHN FITCH, Register.—In this case the witness claims that the rule which protects professional communications of clients to their attorney or counsel, extends to all business communications as well as those appertaining to suits in law or equity or other judicial proceedings. Upon examining the authorities, I find that in the early history of litigation parties prosecuted or defended their suits in person. In the progress of time, as litigation increased, and judicial proceedings became settled and established, men skilled and learned in the law and practice of the courts were employed to conduct the prosecution and defence of causes. Parties were not then compelled to testify, and hesitated to communicate the facts in relation to their causes to others; to obviate that difficulty the courts adopted the rule in relation to professional communications of clients to their attorneys, exempting the same from disclosure, &c. Among the early cases upon this subject is that of *Annesly* v. *The Earl of Anglesea*, before the Barons of the Irish Exchequer: 17 Howell's State Trials 1139. The case was most extensively and ably argued, and very elaborately considered by the court, and the conclusion arrived at as to the true origin of the rule in question may be best stated in the language of Mr. Baron MOUNTENAY, who says, at page 1240, "Mr. Recorder has very properly mentioned the foundation upon which it hath been held, and it is certainly undoubted law that attorneys ought to keep inviolably the secrets of their clients, viz.: That an increase of legal business and the inability of parties to transact that business themselves, made it necessary for them to employ other persons who might transact that business for them. That this necessity introduced with it the necessity of what the law hath very justly established, an inviolable secrecy to be observed by attorneys, in order to render it safe for clients to communicate to their attorneys all proper instructions for the carrying on of these causes which they found themselves under the necessity of intrusting to their care."

In the case of *Dixon* v. *Parmelee*, 2 Vt. Rep. 185, PADDOCK, J., says: "It also became necessary for courts to adopt a rule by way of pledge to suitors that their secret and confidential communications to their attorneys should not be drawn from them with or without the consent of such attorney." Among the earliest cases to be found on this subject are *Berd* v. *Lovelace*, Cary's Rep. 88; *Austin* v. *Vesey*, Id. 89; *Kilway* v. *Kilway*, Id.

126; *Dennis* v. *Codrington*, Id. 143. Solicitors and counsel were excused from testifying on the ground that they were solicitors or counsel in the cause. In *Waldron* v. *Ward*, Styles' Rep. 449, a witness was offered in evidence to be examined as to some matter "whereof he had been made privy as of counsel in the cause." The courts would not permit the examination. In *Sparke* v. *Middleton*, Keble 505, counsel for the defendant was excused from testifying on the ground "that he should only reveal such things as he either knew before he was of counsel, or that came to his knowledge since by other persons." In *Cuts* v. *Pickering*, 1 Ventr. 197, a witness was called to testify concerning an erasure in a will supposed to have been made by Pickering. The witness, after the erasure, was retained as his solicitor in the cause. In *Valiant* v. *Dodermead*, 2 Atk. 524, witness was called to prove certain interrogatories. Objections, that his knowledge of the matters was obtained as a clerk in court. Evidence received. Lord HARDWICKE says: "That the matters inquired after by the plaintiff's interrogatories were antecedent transactions to the commencement of the suit." In the last-cited cases the communications to the respective parties were during the pendency of an action in which they were either attorney, solicitor, or counsel. The same rule is held by the courts in this state, and seems to decide the question in this case. In 17 Johns. 335, the court says: "The privilege, in its most comprehensive sense, is not broad enough to cover collateral facts, the answer to which does not betray any confidential communication between attorney and client."

An attorney or counsel may be called on to testify to a collateral fact within his knowledge, or to a fact which he might know without being intrusted with it by his client: *Johnson* v. *Daverne*, 19 Johns. 134; *Cobden* v. *Kendrick*, 4 Term 431.

Communications made to an attorney at law with a view to obtain his assistance in the commission of a felony are not privileged: *The Rochester City Bank* v. *Suydam*, 5 How. 254. To be brought within its protection if they do not appertain to any suit or legal proceeding commenced or contemplated, should be made under cover of an employment *strictly professional*, and should be such as the business to be done requires to be made. They should also be of a confidential nature, and so considered at the time, and should be shown to have been made with direct

reference to the professional business upon which they may be supposed to bear: 17 Howell's State Trials 1139; 1 Greenlf. Ev. 244; 1 Phil. Ev. 145; 1 Starkie.

In section 26 of the Bankrupt Act 1867, it is provided that the court may at all times require the bankrupt, upon reasonable notice, to attend and submit to an examination on oath upon all matters relating to the disposal or condition of his property; the bankrupt is therefore liable to be called (and in this case has been called) and examined upon these very transactions. He cannot extend an immunity to his attorney which he does not possess himself. The privilege is for the benefit of the client, not the attorney. The authorities upon this point which I have cited show that originally no communications were protected as confidential professional communications, except that which related to the management of some suit or judicial proceeding actually pending or about to be commenced in some court. Few cases have gone beyond that. In the case of *Wilson* v. *Troup*, 7 Johns. C. Rep. 25, and s. c. 2 Cowen Rep. 195, Haight, an attorney, was retained to conduct the foreclosure of a mortgage by advertisement under the act concerning the foreclosure of mortgages by advertisement. It was claimed that Troup employed Haight because Haight was a lawyer, and the Court of Errors evidently considered the relation of the party in the statutory foreclosure case, namely, Troup and Haight, as that of attorney and client, and therefore the evidence of Haight was not admissible as against Troup, his client. This decision is unquestionably correct and founded upon the principle that a statutory foreclosure of a mortgage by advertisement is in the nature of a judicial proceeding. And in *Jackson* v. *Dominick*, 14 Johns. Rep. 443, the court says, "that a foreclosure under the statute is substantially equivalent to a foreclosure in equity, same in effect:" 5 How. Pr. Rep. 261.

In this case there was no action pending. The witness drew a deed conveying certain real estate from James Milligan to himself. He then conveyed the said real estate to Mrs. Milligan, the wife of said James Milligan. There was no action then pending in regard to said real estate, and the question before the court in relation to said real estate now is, whether the legal title of the real estate so conveyed vests in Mrs. Milligan as against the assignee in bankruptcy. Now, the witness is simply called upon

to state the fact of the receiving and the conveying of the real estate, the consideration, if any, he gave or received therefor, and what was said and done on the occasion. His testimony, if given, cannot do injustice to any one. The same facts have been proven by James Milligan in these proceedings. The deeds can be given in evidence, and although Mrs. Milligan cannot be compelled to testify to these facts in bankruptcy, still she can be made to do so by a bill in equity on the part of the assignee against herself, her husband and the witness to set aside said conveyance as fraudulent, &c., &c., as against the assignee in bankruptcy: 30 Barb. 506. The Court of Appeals in *Whiting* v. *Barney*, 30 N. Y. 330, SELDEN, J., holds that the rule which protects professional communications of clients to their attorneys or counsel from disclosure should only extend to such communications as have relation to some suit or other judicial proceeding either existing or contemplated.

The testimony in this case is claimed only for the bankrupt, which brings it within the cases of *Griffith* v. *Davis*, 5 Barn. & Ald. 502; *Shore* v. *Bedford*, 5 Man. & G. 271; *Weeks* v. *Argent*, 16 M. & W. 816. In 30 N. Y. 342, INGRAHAM, J., says, "If he was only the counsel of Barney, then the decisions settle that the disclosures being made in the presence of a third party, they are not privileged." I think that for the purposes of this case Mrs. Milligan, the wife of the petitioner, who received the conveyance from the witness as property to her sole and separate use, must be considered as a third person. I have given the authorities as they were previous to the legislative enactments in this state in relation to the examination of parties as witnesses, which enactments are as follows: Any party in any civil suit or proceeding, either in law or equity, had before any court or officers, may require any adverse party, whether complainant, plaintiff, petitioner or defendant, or any one of said adverse party, any and every person who is beneficially interested in said suit or proceedings, though not nominally as parties, to give testimony under oath in such suit or proceeding; and such adverse party may be examined orally, or under a commission, in the same manner as persons not parties to such suit or proceeding, and who are com petent witnesses therein; and such party may be subpœnaed and his attendance as a witness compelled, or he may be examined by a commission, or conditionally, or his testimony perpetuated in the same manner as any competent witness.

"The court or officer before whom such suit or proceeding may be had, shall have power to dismiss the bill, petition, or proceeding of any party, or any part thereof, with costs, or nonsuit any party, or strike out or disregard any defence or any part thereof of any party who shall refuse to testify.

"Any party in any suit or proceeding as aforesaid shall be required, to entitle him to examine the adverse party as a witness in any suit or proceeding, to give testimony therein in the same manner as the attendance of witnesses in ordinary cases."

The Act of Congress, July 16th 1862, provides:—

"That the laws of the state in which the court shall be held, shall be the rules * * * as to the competency of witnesses in the court of the United States."

In this case the rights and privileges of the attorney and his duty to his clients, are entirely separate and distinguished from his rights and duties as purchaser and vendor. The transaction in relation to the purchase and sale of the real estate was not a part and parcel of, or in and about any lawsuit in which he was counsel for either the petitioner or his wife. It therefore stands as a transaction of purchase and sale of real estate, the witness purchasing the real estate of Mr. Milligan, and selling the same to Mrs. Milligan, his wife, two days thereafter.

It is claimed by the assignee in bankruptcy that this was a mere fraud and cover, that it was a mere formal transfer of the real estate from the husband to the wife, using the name of the witness as a mere go-between, so that the conveyance might technically conform to the letter of the Act of 1849 regulating the property-rights of married women, and at the same time defeat the spirit and intent of the law; that the wife acquired no legal or vested rights therein by said conveyance other than her contingent right of dower to which she was previously entitled.

I find that previous to the Act of 1847, and the acts amendatory thereunto, an attorney occupied the same position as his client in relation to giving testimony, and was privileged as to all matters which his client could not be compelled to disclose. But now, whenever and wherever the client can be compelled as a witness to testify to any fact, then the attorney must also testify; the statutes of this state having abrogated the former common-law rule to that effect.

That the witness in this case is not privileged, as the mere act of receiving and conveying the title to real estate about which there has not been any action pending, does not bring him within the former common-law rule, as to privileged communications to attorneys and counsel, and since the enactment of 1847 no such privilege exists which can be claimed for the witness in this case.

That the questions are pertinent to the issue and proper, and the witness must answer.

BLATCHFORD, J.—On the facts stated by the Register, the five questions set forth were proper, and must be answered by the witness, and are not within the privilege of confidential communications between attorney and client.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

COURT OF APPEALS OF MARYLAND.[1]

SUPREME COURT OF PENNSYLVANIA.[2]

ASSUMPSIT.

Transfer of Contract.—Thompson contracted to buy an interest in two oil-wells, afterwards an oil company was incorporated to which Thompson transferred his interest, the vendors in the mean time receiving and selling the oil; by agreement, the vendors made the deed to the corporation, and dated it back to the date of the contract, agreeing to deliver Thompson's share of the oil to the company: *Held*, that *assumpsit* in the name of the company for oil received by the vendors between the contract and the incorporation could be maintained: *Snow* v. *Thompson Oil Co.*, 59 Pa.

The facts constituted an original contract between the vendors and the company: *Id.*

BANKS.

Usage—Special Deposits—Contracts for Payment in Coin.—On the 30th of December, 1861, A. sent to the Chesapeake Bank $3000, in gold coin of the United States, which in accordance with a previous agreement, was received as a *special deposit*, and entered on the bank-book of A., as follows: "1861, Dec. 30th, Cash (coin) $3000." At the date of this deposit, the banks of the state had suspended specie payments, and gold coin was at a small premium. A. drew two checks

[1] From J. Shaaf Stockett, Esq., Reporter; to appear in 29 Md. Rep.

[2] From P. Frazer Smith, Esq., Reporter; to appear in 59 Pa. Rep.